(1)

88-435

Supreme Court, U.S.
FILED
AUG 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

MARIANNE B. GEAR,

Petitioner,

v.

BOULDER COMMUNITY HOSPITAL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

William E. Benjamin
Counsel of Record
1906 Thirteenth Street
Suite 300
Boulder, Colorado 80302
303/442-9005
Attorney for Petitioner

QUESTION PRESENTED

Did the trial court commit reversible error in granting summary judgment against a party who did not receive express notice from the court of the pendency of the motion for summary judgment and, therefore, did not respond to said motion within the time period set by local rule?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(i)
TABLE OF AUTHORITIES	(iii)
OPINIONS BELOW	1
JURISDICTION	1
FEDERAL AND LOCAL RULES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING WRIT	8
CONCLUSION	13
CERTIFICATE OF SERVICE	14
ENTRY OF APPEARANCE	14

APPENDICES

Opinion of Court of Appeals dated April 20, 1988	A-1
Order Granting Summary Judgment of United States District Court dated October 10, 1985	A-10
Judgment of United States District Court dated October 11, 1985	A-12
Minute Order of United States District Court dated October 21, 1985	A-14
Judgment of Court of Appeals dated April 20, 1988	A-15
Order Denying Petition for Rehearing of Court of Appeals dated May 26, 1988	A-16

TABLE OF AUTHORITIES

Cases — Page

Brown v. Shinbaum
828 F.2d 707 (11th Cir.1987) 10

Coleman v. Smith
828 F.2d 714 (11th Cir.1987) 10

Daniels v. Morris
746 F.2d 271 (5th Cir.1984). 11

Donaldson v. Clark
819 F.2d 1551 (11th Cir.1987). . . . 10

Geear v. Boulder Community Hospital
No.85-2758 (10th Cir.Apr.20,1988). passim

Griffith v. Wainwright
772 F.2d 822 (11th Cir.1985) . .9,12,13

Hamman v. Southwestern Gas
Pipeline, Inc.
721 F.2d 140 (5th Cir.1983). . . .11,12

Howell v. Tanner
650 F.2d 610 (5th Cir.1981),
cert.denied, 456 U.S. 918(1982). .11,12

Kibort v. Hampton
538 F.2d 90 (5th Cir.1976) 10,11

Lari v. Ansari
817 F.2d 1521 (11th Cir.1987). . . . 10

Milburn v. United States
734 F.2d 762 (11th Cir.1984) 9

Statutes — Page

28 U.S.C. §1254(1) 2

28 U.S.C. §1447 4

Age Discrimination in Employment Act of 1967, 29 U.S.C. §621. 4

Rules

Federal Rule of Civil Procedure 56 . . passim

Local Rules of Practice of the United States District Court for the District of Colorado
Rule 402(F) . . . . . passim

Rule 402(G) 3,4,7

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on April 20, 1988.

OPINIONS BELOW

The April 20, 1988 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, No. 85-2758, is as yet unreported and is contained in the separate appendix to this petition at pp. A-1 to A-9. The prior order granting summary judgment (dated October 10, 1985) and judgment (dated October 11, 1985) of the United States District Court for the District of Colorado, in its Case No. 85-K-1301, are set out in the appendix at pp. A-10 and A-11.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1988. A timely

petition for rehearing was denied on May 26, 1988. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

FEDERAL AND LOCAL RULES INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure, which is set out as follows and as pertinent hereto:

Rule 56. Summary Judgment

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing

> affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
>
> ***
>
> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
>
> ***

This case also involves Rules 402(F) and (G) of the Local Rules of Practice of the United States District Court for the

District of Colorado, which provide as follows:

> Rule 402. Extensions of Time, Briefs and Certificates of Mailing
>
> ***
>
> F. A motion under Rule 56, F.R. Civ.P. or a motion seeking remand under 28 U.S.C. §1447 shall be supported by a brief filed with the motion. A brief opposing a motion under Rule 56, F.R.Civ.P. shall be filed on or before twenty (20) days after service of the motion or within such extended time as may be allowed by the court. Briefs opposing a motion to remand under 28 U.S.C. §1447 may be filed only with permission of the court. Reply briefs to a motion under Rule 56, F.R.Civ.P. or 28 U.S.C. §1447 may be filed only with permission of the court.
>
> G. Oral argument will be at the court's discretion.

STATEMENT OF THE CASE

The petitioner ("Geear") filed a complaint against the Boulder Community Hospital ("Hospital") for an alleged violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621, et seq., on May 8, 1985. The Hospital filed its answer denying the alle-

gations on July 3.

The Hospital took Gecar's deposition on July 19, 1985, and used portions of that deposition, together with affidavits from its own employees, in support of its motion for summary judgment pursuant to F.R.Civ.P. 56, which it filed on September 13, 1985. Gecar did not submit a brief in opposition to said motion or otherwise respond prior to October 10, 1985, when the trial court entered its Order Granting Summary Judgment. The trial court acted pursuant to Rule 402 (F) of the Local Rules of Practice of the United States District Court for Colorado which provides, inter alia, that "[a] brief opposing a motion under Rule 56, F.R.Civ.P. shall be filed on or before twenty (20) days after service of the motion or within such extended time as may be allowed by the court ..."

Gecar filed a motion for new trial and supporting brief on October 21, 1985, in which she argued that Rule 56(c) required

that the trial court either should have held a hearing or found that she had waived the hearing or notice requirements of Rule 56 before ruling on the motion. She also asserted that the local rule upon which the trial court had relied did not specifically state that failure to file an opposing brief within the 20 days allowed would result in the entry of an order granting summary judgment without further notice, without the opportunity to file opposing affidavits, and without a hearing. Since she was not aware that a final judgment could have resulted from her failure to file an opposing brief within 20 days from service of the Hospital's motion, Geear asserted that she could not have been deemed to have waived her rights to the procedural requirements of Rule 56(c).

The trial court denied Geear's motion on the same day it was filed, without comment. (Minute Order of October 21, 1985, set out in the appendix hereto at p.A-12).

Geear filed a timely appeal with the

Court of Appeals, asserting to it the same issue raised before the trial court. In its opinion issued on April 20, 1988, that Court recognized that "[t]he district court neither conducted an oral hearing nor gave the appellant individualized notice of the date he would decide the motion for summary judgment." (Opinion,A-3) The Court found, however, that the lower court's review of the Hospital's brief and supporting affidavits "satisfied the 'hearing' requirement of Rule 56." (Opinion, A-5) It furthermore held as follows (Opinion,A-7,A-8):

> Although the [local] rule might have been more precisely drafted, in context the rule sufficiently apprises one that the term 'brief' encompasses any response by the opposing party to the summary judgment motion. Because subsection G of the rule indicates that oral argument on the motion is discretionary with the court, local rule 402, as a whole, provides adequate notice that the motion is considered ready for a determination on its merits as of twenty days after service of the motion. Having been so informed, it was incumbent upon [Geear] to produce by that date evidence showing a genuine issue of fact for trial.

REASONS FOR GRANTING WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICT AMONG THE FEDERAL CIRCUITS

The position of the Court of Appeals in this matter is in conflict with that of the Court of Appeals for the Eleventh Circuit. This conflict was recognized in the Court's Opinion (at A-5), but the Court chose to follow the Fifth Circuit's construction of Rule 56(c). (Opinion at A-7)

The primary distinction between the positions of the Fifth and Eleventh Circuits is whether a non-moving party to a motion for summary judgment is entitled to actual or merely constructive notice of the date when the court will take the motion under advisement. A secondary issue is whether, in the present case, Geear could be deemed to have had even constructive notice of that date due to the lack of specificity in Local Rule 402(F), which as the Court of Appeals acknowledged, "might have been more precisely drafted." (Opinion at A-7)

The Eleventh Circuit has set forth in several cases exactly what notice is required prior to granting a motion for summary judgment. As stated in Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985):

> While it is well settled in this Circuit that this requirement [for a 10-day advance notice] does not of necessity require that such notice be given at an oral hearing [citation omitted], our jurisprudence requires at least this: that an adverse party must be given express, ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default. That done, the court may properly take the motion under advisement as of a day certain and may rule on the motion consistent with the dictates of procedural fairness required by Rule 56. [Citations omitted.]

While Griffith and many of the other Eleventh Circuit cases applying this standard concern actions brought by indigent prisoners, "this requirement of notice will be deemed strictissimi juris and applies to all parties litigant." Griffith at 825 [emphasis in original], citing Milburn v. United States, 734 F.2d 762, 766 (11th Cir. 1984). Since Griffith, the Eleventh Circuit has applied

the same requirement in Lari v. Ansari, 817 F.2d 1521, 1523 (1987); Brown v. Shinbaum, 828 F.2d 707, 708 (1987); Coleman v. Smith, 828 F.2d 714, 716 (1987) and Donaldson v. Clark, 819 F.2d 1551, 1553 (1987)(en banc).

The Fifth Circuit initially established the requirement of notice now followed by the Eleventh Circuit. In Kibort v. Hampton, 538 F.2d 90 (5th Cir. 1976), the defendant had filed a motion for summary judgment which the trial court granted twenty-two days later without any notice or hearing and without receiving a response from the plaintiff. The Kibort court determined that, while Rule 56(c) did not require a hearing, it did require "a ten day advance notice to the adverse party that the matter will be heard and taken under advisement as of a certain day. This provides the adverse party with the opportunity to prepare and submit affidavits, memoranda and other materials for the court to consider when ruling on the motion. If the adverse party is given this opportunity, then he has been heard within

the meaning of Rule 56." Kibort, 538 F.2d at 91.

As the Tenth Circuit noted in its opinion here (at A-6), the Kibort court also stated in a footnote that an adequate hearing would "appear" to be afforded by local rules requiring "opposing affidavits and briefs to be filed within a period of not less than ten days after which the court will consider the motion submitted for decision." Kibort, 538, F.2d at 91 note 1. Since then, the Fifth Circuit has consistently found that such local rules provide adequate notice of the pendency of Rule 56 motions. See, e.g., Hamman v. Southwestern Gas Pipeline, Inc., 721 F.2d 140, 142 (5th Cir. 1983); Howell v. Tanner, 650 F.2d 610, 614 (5th Cir. 1981), cert. denied, 456 U.S. 918 (1982); Daniels v. Morris, 746 F.2d 271 (5th Cir. 1984). In each of those cases, however, the opinions noted that the non-moving party had filed a response to the motion for summary judgment and, therefore, could not dispute notice of

the pendency of the motion. Hamman, 721 F.2d at 142; Howell, 650 F.2d at 614; Daniels, 746 F.2d at 274.

In the present case, Geear did not file a response to the Hospital's motion for summary judgment because she did not have "express, ten-day notice of the summary judgment rules, of [her] right to file affidavits or other material in opposition to the motion, and of the consequences of default," as required by Griffith. The need for this express notice is also set out in Griffith, 772 F.2d at 825, note 4:

> The policy considerations which underlie this consistent requirement are premised on the fact that disposition of a case on summary judgment grounds represents a final adjudication on the merits. It forecloses subsequent litigation on the matter; it is accordingly important that proper notice be given so as to insure "opportunity to present every factual and legal argument available." [Citation omitted.]

Express notice should be required even when, as in the instant case, a local rule purports to give constructive notice of the date after which the motion may be determined

on its merits since Local Rule 402(F) does not, inter alia, inform the non-moving party "of the consequences of default", as required in Griffith.

Because the holdings of the Eleventh Circuit, as noted above, provide important protections to litigants that are not provided by the Fifth and Tenth Circuits, this Court should act to resolve this conflict among the federal circuits to ensure uniformity among them on this vital issue.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

William E. Benjamin
Attorney for Petitioner
1906 Thirteenth St., #300
Boulder, Colorado 80302
(303) 442-9005

CERTIFICATE OF SERVICE

I, William E. Benjamin, a member of the Bar of this Court representing the petitioner in this action, hereby certify that I deposited three copies of the above PETITION FOR A WRIT OF CERTIORARI on the 8th day of September, 1988 in a United States Post Office, with first-class postage prepaid, addressed to the following counsel of record, pursuant to Rule 28.3 of this Court:

Melvin E. Sabey, SAUNDERS, SNYDER, ROSS & DICKSON, P.C., 707 17th St., #3500, Denver, Colorado 80202.

William E. Benjamin
Counsel for Petitioner

ENTRY OF APPEARANCE

William E. Benjamin, a member of the Bar of this Court, hereby enters his appearance on behalf of the petitioner herein.

William E. Benjamin
1906 Thirteenth St.,#300
Boulder, Colorado 80302
(303) 442-9005

APPENDICES

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT
No. 85-2758

MARIANNE B. GEEAR, Plaintiff-Appellant,

v.

BOULDER COMMUNITY HOSPITAL,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

(D.C. No. 85-K-1301)

William E. Benjamin, Boulder, Colorado, for Plaintiff-Appellant.

Melvin E. Sabey, (Deborah E. Smith with him on the brief), Saunders, Snyder, Ross & Dickson, Denver, Colorado, for Defendants-Appellees.

Before LOGAN and ANDERSON, Circuit Judges, and CONWAY, District Judge.*

CONWAY, District Judge.

---

*The Honorable John E. Conway, United States District Judge for the District of New Mexico, sitting by designation.

The issue presented on appeal is whether the lower court complied with the notice and hearing requirements of Fed. R. Civ. P. 56 when it granted summary judgment for the Defendant. On May 8, 1985, appellant Geear filed suit against Boulder Community Hospital alleging that its termination of her employment violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621. On September 13, 1985 the Hospital filed a motion for summary judgment to which the Plaintiff did not respond. On October 9, 1985 the Hospital requested an expedited ruling on its summary judgment motion. By order entered on October 11, 1985, more than twenty days after the motion for summary judgment was filed and served on opposing counsel, the court granted the Defendant's motion. The court expressly found that "if uncontradicted, the affidavits amply support the granting of the motion" and that the appellant had failed to contradict the Defendant's affidavits.

The district judge neither conducted

an oral hearing nor gave the appellant individualized notice of the date he would decide the motion for summary judgment. Contending that summary judgment cannot be entered under such circumstances, counsel for Geear filed what was denominated as a motion for a new trial. Upon denial of the Plaintiff's motion, Geear filed this appeal.

The appellant contends that the district court's action violates the notice and hearing provisions of Fed. R. Civ. P. 56(c). The relevant portion of Rule 56 provides:

> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

We have previously held that a court must hold a hearing on a summary judgment motion. Dolese v. United States, 541 F.2d 853 (10th Cir. 1976). Moreover, the hearing

should not be held earlier than ten days after the motion is served on opposing counsel. Id. at 854-55; see also Mustang Fuel Corp. v. Youngstown Sheet and Tube Co., 480 F.2d 607, 608 (10th Cir. 1973). A formal evidentiary hearing with oral argument, however, is not necessarily required. Nolan v. C. DeBaca, 603 F.2d 810, 812 (10th Cir. 1979), cert. denied, 446 U.S. 956 (1980). Rather, the parties' right to be heard may be fulfilled by the court's review of the briefs and supporting affidavits and materials submitted to the court. Id. at 812.

The order of the lower court clearly reflects that the district judge examined the briefs and supporting materials to evaluate the merits of the motion for summary judgment. Nothing in the record suggests that the issues and evidence presented in this case could not be addressed adequately in the form of written briefs with accompanying affidavits, depositions and similar exhibits. Based upon its review

of the submitted materials, the court found that entry of judgment was appropriate because there was no genuine issue of fact, and the Defendant was entitled to judgment as a matter of law. Thus, the court satisfied the "hearing" requirement of Rule 56.

Geear further contends that the lower court's action violated the notice requirement of Rule 56. Because courts often take several months to rule on summary judgment motions, Geear asserts that the non-movant need not respond to the motion until the court indicates that it will consider a motion for summary judgment on a certain date. According to Geear, the court should give express, written ten-day notice to the non-movant that briefs and material in opposition to the motion must be submitted to avoid summary judgment. This is the rule adopted in the Eleventh Circuit and the appellant urges that we adopt it here. See Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985).

The appellee Hospital agrees that in the absence of a formal hearing on a motion for summary judgment, the adverse party must receive at least ten days notice that the matter will be taken under advisement as of a certain day. However, the Hospital relies upon Rule 402 of the Local Rules of Practice for the United States District Court for the District of Colorado for the provision of such notice. The rule provides in part:

> F. A motion under Rule 56, F.R.Civ.P. ... shall be supported by a brief filed with the motion. A brief opposing a motion under Rule 56, F.R.Civ.P. shall be filed on or before twenty (20) days after service of the motion or within such extended time as may be allowed by the court ...
> G. Oral argument will be at the court's discretion.

In the case of Kibort v. Hampton, 538 F.2d 90 (5th Cir. 1976), the Fifth Circuit stated in dictum:

> Procedures provided by local rule in some districts requiring motions for summary judgment to be accompanied by briefs and requiring opposing affidavits and briefs to be filed within a period of not less than ten days after which the court will consider the motion submitted for decision would appear to afford

> adequate hearing within the meaning of Rule 56.

Kibort, 538, F.2d at 91 note 1. Since Kibort, the Fifth Circuit has held that rules similar to the Colorado rule will fulfill the notice requirement of Fed. R. Civ. P. 56. Hamman v. Southwestern Gas Pipeline, Inc., 721 F.2d 140, 142 (5th Cir. 1983); Howell v. Tanner, 650 F.2d 610, 614 (5th Cir. 1981), cert. denied, 456 U.S. 918 (1982). We agree with the Fifth Circuit's construction of Rule 56(c) and hold that a local rule which provides that responses to motions must be submitted within a certain time period of at least ten days fulfills the notice requirement of rule 56(c).

Colorado local rule 402 F requires that a "brief" in opposition to a summary judgment shall be filed no later than twenty days after service of the motion. Although the rule might have been more precisely drafted, in context the rule sufficiently apprises one that the term "brief" encompasses any response by the opposing party to the summary

judgment motion. Because subsection G of the rule indicates that oral argument on the motion is discretionary with the court, local rule 402, as a whole, provides adequate notice that the motion is considered ready for a determination on its merits as of twenty days after service of the motion. Having been so informed, it was incumbent upon the plaintiff to produce by that date evidence showing a genuine issue of fact for trial. The plaintiff received the notice and the hearing to which she was entitled.

Our ruling in the case of D G Shelter Products Co. v. Forest Products Co., 769 F.2d 644 (10th Cir. 1985), is not contrary to our decision today. The trial court in D G Shelter relied upon Local Rule 9(j)(2) of the Local Rules for the District of New Mexico when it granted summary judgment. However, the New Mexico court specifically entered summary judgment as a sanction for failure to respond and the court did not evaluate the merits of the motion. Although the harsh

remedy of dismissal as a sanction for non-compliance with local rules can constitute an abuse of discretion, no such scenario is present here. Rather, Judge Kane based entry of judgment upon a review of the record as of a date the parties should have known the motion could be considered on its merits. Having received adequate notice that the motion was ready for ruling, the non-movant was not free to rest upon the allegations of her pleadings. As the plaintiff failed to produce evidence to support her allegations after sufficient notice of the need to do so, the entry of summary judgment was appropriate.

AFFIRMED.

F I L E D

United States Court of Appeals

Tenth Circuit

April 20, 1988

Robert L. Hoecker

Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 85-K-1301

MARIANNE B. GEEAR,

Plaintiff,

vs.

BOULDER COMMUNITY HOSPITAL,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT

KANE, J.

On September 13, 1985 the defendant filed a Motion for Summary Judgment with brief and affidavits in support thereof. If uncontradicted, the affidavits amply support the granting of the motion. More than twenty (20) days have elapsed since service of the motion, brief and affidavits upon the plaintiff yet the plaintiff has failed to respond.

There is no genuine issue of fact and the defendant is entitled to a judgment as a matter of law. It is appropriate pursuant to Rule 56(e) Fed.R.Civ.P. to enter judgment

against the plaintiff. Accordingly,

IT IS ORDERED that defendant's motion for summary judgment is granted. Judgment of dismissal shall enter. Defendant is awarded costs.

DATED at Denver, Colorado this 10th day of October, 1985.

_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 85-K-1301

MARIANNE B. GEEAR,

Plaintiff,

vs.

BOULDER COMMUNITY HOSPITAL,

Defendant.

JUDGMENT

Pursuant to and in accordance with the Order Granting Summary Judgment entered by the Honorable John L. Kane, Jr., Judge on the 10th day of October, 1985, it is hereby

ORDERED that judgment is entered for the defendant Boulder Community Hospital and against plaintiff Marianne B. Geear; that this civil action and complaint are dismissed and that the defendant shall have its costs upon the filing of a Bill of Costs with the Clerk of this Court within 10 days of the entry of this judgment.

Dated at Denver, Colorado, this 11th day

of October, 1985.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By: _____

Stephen P. Ehrlich

Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 85-K-1301

MARIANNE B. GEBAR,

Plaintiff[s],

vs.

BOULDER COMMUNITY HOSPITAL,

Defendant[s].

MINUTE ORDER - JUDGE KANE

Judge John L. Kane, Jr. ORDERS

The motion for new trial is DENIED.

Mary Clark, Secretary DATE: October 21,1985

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARCH TERM - April 20, 1988

Before Honorable James K. Logan, Honorable Stephen H. Anderson, Circuit Judges, and Honorable John E. Conway, District Judge.*

MARIANNE B. GEEAR,	)	
	)	
Plaintiff-Appellant,	)	JUDGMENT
	)	
v.	)	No. 85-2758
	)	
BOULDER COMMUNITY HOSPITAL,	)	(D.C.# 85-K-1301)
	)	
Defendant-Appellee.	)	

This cause came on to be heard on the record from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

ROBERT L. HOECKER, Clerk

* Of the United States District Court for the District of New Mexico, sitting by designation.

MAY TERM - May 26, 1988

Before Honorable William J. Holloway, Jr., Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deannell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Circuit Judges, and Honorable John E. Conway, District Judge *

MARIANNE B. GEEAR	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 85-2758
	)	
BOULDER COMMUNITY HOSPITAL,	)	
	)	
Defendant-Appellee.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned appeal.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the

panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

ROBERT L. HOECKER,
Clerk

* Of the United States District Court for the District of New Mexico, sitting by designation.

Supreme Court, U.S.
FILED
OCT 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-435

In The

Supreme Court of the United States

October Term, 1988

MARIANNE B. GEEAR,

Petitioner,

v.

BOULDER COMMUNITY HOSPITAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAUNDERS, SNYDER, ROSS & DICKSON, P.C.

WAYNE J. FOWLER
707 17th Street, Suite 3500
Denver, Colorado 80202
(303) 292-6600

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

FEDERAL AND LOCAL RULES iii

INTRODUCTION 1

GROUNDS FOR OPPOSITION TO PETITION 1

I. THERE IS NO CONFLICT REQUIRING RESOLUTION AMONG THE FEDERAL COURTS OF APPEAL 1

A. Geear's Reliance on Griffith is Misplaced 1

B. None of the Other Cases Cited by Geear Establish That a Conflict Exists 3

C. Given the Proper Case, an Eleventh Circuit Holding on the Notice Issue Would Most Likely be Consistent with That of the Tenth Circuit 4

II. THERE SHOULD NOT BE CONFLICT BETWEEN THE ELEVENTH AND REMAINING CIRCUITS REGARDING THIS ISSUE ... 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Adams v. Campbell County School District, 483 F.2d 1351 (10th Cir. 1973) 2

Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981) 2

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (*en banc*) 5

Brown v. Shinbaum, 828 F.2d 707 (11th Cir. 1987) 3

Coleman v. Smith, 828 F.2d 714 (11th Cir. 1987) 3

Crown Central Petroleum Corp. v. Waldman, 634 F.2d 127 (3d Cir. 1980) 3

Davis v. Bryan, 810 F.2d 42 (2d Cir. 1987) 3

Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) 2

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) 3

Garaux v. Pulley, 739 F.2d 437 (9th Cir. 1984) 2, 3

Griffith v. Wainwright, 772 F.2d 822 (11th Cir. 1985) .. 1, 3

Herron v. Beck, 693 F.2d 125 (11th Cir. 1982) 4

Howell v. Tanner, 650 F.2d 610 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982) 4, 5

Hudson v. Hardy, 412 F.2d 1091 (D.C. Cir. 1968) 2

Kibort v. Hampton, 538 F.2d 90 (5th Cir. 1976) 6

Lary v. Ansari, 817 F.2d 1521 (11th Cir. 1987) 3

Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982) 2

Milburn v. United States, 734 F.2d 762 (11th Cir. 1984) 3, 4

Moore v. State of Florida, 703 F.2d 516 (11th Cir. 1983) 4, 5

TABLE OF AUTHORITIES–Continued

Page

Nichols v. United States, 796 F.2d 361 (10th Cir. 1986) 3

Prospero Asso. v. Burroughs Corp., 714 F.2d 1022 (10th Cir. 1983) 2

Smith's Estate v. Terrant County Hosp. Dist., 691 F.2d 207 (5th Cir. 1982) 3

Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985) 3

FEDERAL AND LOCAL RULES

Federal Rule of Civil Procedure 56 ..... 3, 4

Rules of the Supreme Court of the United States 17.1 1

INTRODUCTION

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted where there are special and important reasons therefor." Sup. Ct. R. 17.1. One of the "special and important reasons" set forth in the Rule is the circumstance in which one federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. Petitioner Geear, in hopes of satisfying the threshold criteria for review on writ of certiorari, has attempted to shape a conflict between the Eleventh and remaining federal courts of appeal concerning the manner of notice required to be given by the Court to the adverse party with respect to the type and timing of any response by the adverse party prior to the consideration of a motion for summary judgment by that court. Geear's Petition must fail because she has not established the existence of a conflict requiring resolution betweent the Eleventh and Tenth Circuits.

GROUNDS FOR OPPOSITION TO PETITION

I. THERE IS NO CONFLICT REQUIRING RESOLUTION AMONG THE FEDERAL COURTS OF APPEAL.

A. Geear's Reliance on Griffith is Misplaced.

Petitioner Geear's argument in support of her Petition for Writ of Certiorari is predominantly based upon Geear's reading of the Eleventh Circuit's decision in *Griffith v. Wainwright*, 772 F.2d 822 (11th Cir. 1985). Geear interprets the Eleventh Circuit to require actual notice to

a nonmoving party, at least ten days in advance, of the date upon which the court will take a motion for summary judgment under advisement. She contrasts that decision to that of the Tenth Circuit below which, following the lead of the Fifth Circuit, held that the constructive notice provided by a local rule of the court adequately affords notice to an adverse party.

However, a careful look at the facts of *Griffith* reveals that Geear's reliance upon *Griffith* as establishing a conflict is misplaced. *Griffith* was a pro se civil rights action, filed by a Florida state prisoner, in which the federal district court granted the defendants' Motion for Summary Judgment as an alternative to their F.R.Civ.P. 12(b)(6) Motion to Dismiss. The facts which clearly support the resolve of the court in *Griffith* that a 10-day advance notice should have been given are (1) a pro se litigant, and (2) a motion to dismiss converted, in the alternative, to a motion for summary judgment. There is agreement among all of the circuits that have had the opportunity to rule thereon that the presence of either of these facts requires actual notice to the adverse party. For the holding that special care must be exercised to ensure proper notice is given to a pro se litigant, *see Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981); *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968); *Davis v. Zahradnick*, 600 F.2d 458 (4th Cir. 1979); *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982); and *Garaux v. Pulley*, 739 F.2d 437 (9th Cir. 1984). For the holding that a motion to dismiss, when converted to a motion for summary judgment, pursuant to F.R.Civ.P. 12(b) requires actual notice, *see Adams v. Campbell County School District*, 483 F.2d 1351 (10th Cir. 1973); *Prospero Associates v. Burroughs Corp.*, 714 F.2d 1022

(10th Cir. 1983); *Nichols v. United States*, 796 F.2d 361 (10th Cir. 1986); *Garaux, supra; Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985); *Davis v. Bryan*, 810 F.2d 42 (2d Cir. 1987); *Smith's Estate v. Tarrant County Hosp. Dist.*, 691 F.2d 207 (5th Cir. 1982); and *Crown Central Petroleum Corp. v. Waldman*, 634 F.2d 127 (3d Cir. 1980). *Griffith* does not address how the Eleventh Circuit would rule in a case involving a litigant represented by counsel and a motion for summary judgment filed pursuant to F.R. Civ. P. 56, as expanded by applicable local rules of the federal district court. Thus, the *Griffith* case does not establish that a conflict exists between the Eleventh and Tenth Circuit federal courts of appeal.

B. None of the Other Cases Cited by Geear Establish that a Conflict Exists.

As the Eleventh Circuit stated in *Milburn v. United States*, 734 F.2d 762 (11th Cir. 1984), "earlier cases enforcing the 10-day notice requirement involved fact patterns different from that before us," e.g., pro se litigants, no opportunity for response, no motion for summary judgment filed.[1] All of the other cases cited by Geear, subsequent to the *Griffith* case, contain either a pro se litigant or a converted motion to dismiss. *Lary v. Ansari*, 817 F.2d

---

[1] *Milburn*, while involving plaintiffs who were represented by counsel, also involved circumstances under which a motion to dismiss was converted to a motion for summary judgment. The Eleventh Circuit was asked to rule that the local rule of the lower court had provided adequate notice. However, the Eleventh Circuit found the record so uncertain with respect to the lower court's actions and reasoning that it would not consider the local rule question.

1521 (11th Cir. 1987) (motion to dismiss converted to motion for summary judgment); *Brown v. Shinbaum*, 828 F.2d 707 (11th Cir. 1987) (pro se litigant); *Coleman v. Smith*, 828 F.2d 714 (11th Cir. 1987) (pro se litigant); *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) (motion to dismiss converted into motion for summary judgment). Thus, these cases cannot establish that a conflict exists between the Eleventh and Tenth Circuits.

C. Given the Proper Case, an Eleventh Circuit Holding on the Notice Issue Would Most Likely be Consistent with that of the Tenth Circuit.

It is quite clear that the Eleventh Circuit has never been presented with a proper case, i.e., a party represented by counsel and served with a motion for summary judgment pursuant to F.R.Civ.P. 56, in which to decide if constructive notice pursuant to a local rule of the lower court would be sufficient notice to an adverse party. One Eleventh Circuit case that provides some insight into the Eleventh Circuit's potential stance in a proper case is *Moore v. State of Florida*, 703 F.2d 576 (11th Cir. 1983). Although this case was brought by a pro se prisoner, the Eleventh Circuit Court of Appeals provides illuminating discussion of its notice requirement. The court states:

> Generally, "the 10-day notice requirement of rule 56(c) is strictly enforced." *Herron v. Beck*, 693 F.2d 125, 126 (11th Cir. 1982). However, a recent panel of the former Fifth Circuit adopted what might be referred to as a "constructive notice" theory of Rule 56. In *Howell v. Tanner* (cite omitted), the appellant attacked the granting of a summary judgment against him on the ground that he had not been notified of the date upon which a decision on the motion would be forthcoming. The court affirmed the judgment, however, on the basis of a local rule "which defined a 10-day

> period within which all materials must be filed in order to receive consideration from the court." *Id.* at 614 . . . In this case, the defendants point out that Local Rule 3.01 of the United States District Court for the Middle District of Florida is analogous to the local notice rule at issue in *Howell*. . . . Thus, defendants argue, relying upon *Howell*, that the local rule was sufficient to put Moore on notice that the summary judgment would be taken under advisement within ten days. We disagree, finding the *Howell* case distinguishable because it did not involve a pro se litigant. Pro se inmates, with limited access to legal materials, occupy a position significantly different from that occupied by litigants represented by counsel . . .

Id. at 519-20.

Despite the Eleventh Circuit's stance that a ten-day advance notice is to be enforced for all litigants, it can be argued from the above discussion that the court would at least consider the proposition that notice provided by a local rule of court is sufficient in a proper case. However, whether or not *Moore* demonstrates a willingness on the Eleventh Circuit's part to consider notice by local rule sufficient, the proper case has not as of yet been presented, and it would be premature on the part of this Court to resolve a conflict which it cannot, with assurance, determine even exists.

II. THERE SHOULD NOT BE CONFLICT BETWEEN THE ELEVENTH AND REMAINING CIRCUITS REGARDING THIS ISSUE.

The district courts that comprise what is now the Eleventh Circuit were previously part of the Fifth Circuit. In 1981, the Fifth Circuit's territory was divided, resulting in the addition of the Eleventh Circuit Court of Appeals to the federal court system. The new Eleventh

Circuit adopted as binding precedent all decisions of the Fifth Circuit Court of Appeals announced prior to October 1, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (*en banc*). The key Fifth Circuit case on the issue of notice to an adverse party upon the filing of a motion for summary judgment is *Kibort v. Hampton,* 538 F.2d 90 (5th Cir. 1976). The Court's position is clear:

> What the rule contemplates is ten days advance notice to the adverse party that the matters will be heard and taken under advisement as of a certain day. This provides the adverse party with the opportunity to prepare materials for the Court to consider when ruling on the motion. If the adverse party is given this opportunity, then he has been heard within the meaning of Rule 56.

Id. at 91.

* * *

> Procedures provided by local rule in some districts requiring motions for summary judgment to be accompanied by briefs and requiring opposing affidavits and briefs to be filed within a period not less than 10 days after which the Court will consider the Motion submitted for decision would appear to afford adequate hearing within the meaning of Rule 56.

Id. at page 91, n. 1.

Since *Kibort* was announced prior to October 1981, the Fifth Circuit's position should be the Eleventh Circuit's position under the proper set of factual circumstances. There should be no conflict between the Eleventh and Tenth Circuits on this issue.

CONCLUSION

The granting of a petition for writ of certiorari is a discretionary decision to be made by this Court when special and important issues are presented for review. Petitioner has failed to establish that any such special or important reason for review exists at this time. A conflict between the federal courts of appeal cannot be resolved until the conflict is sufficiently definitive to require resolution. Since none of the Eleventh Circuit cases cited by Petitioner raise the notice question in a fact pattern remotely similar to Petitioner's circumstances, it would be presumptive to assume that the Eleventh Circuit would decide differently than the other federal courts of appeal on the notice issue. Petitioner's Petition for Writ of Certiorari should be denied.

SAUNDERS, SNYDER, ROSS
& DICKSON, P.C.

WAYNE J. FOWLER, #183
707 17th Street, Suite 3500
Denver, Colorado 80202
(303) 292-6600
Attorneys for Respondent